present.[28] (LD SGI ¶ 44). None of the exhibits cited by the Local Defendants were properly authenticated; instead, they were "authenticated" in Ellyn Schneider's affidavit, which was not signed under penalty of perjury. In addition, Plaintiffs insist that several of the documents that Mrs. Schneider purports to authenticate are not, in fact, true and correct copies of the originals. In any event, none of the exhibits reflect a completed, much less implemented IEP, and therefore do nothing to undermine the findings of the CDE. However, the use of these exhibits to establish the number of IEP meetings conducted by the District may be used by the Plaintiffs as an admission because these exhibits evidence the District's tactic of avoiding and delaying actual implementation of services by substituting an endless stream of meetings for real action.

3. Disputes over Non-Material Matters Will Not Defeat Summary Judgment

To defeat a motion for summary judgment, the opponent must establish a genuine issue of ***material fact*** – a fact that must be decided to resolve a claim or defense – for trial. Liberty Lobby, 477 U.S., at 248. Disputes over non-material matters, even if established, will not defeat an otherwise meritorious motion for summary judgment.

In this case, the Local Defendants quibble over diction and semantics that have no material effect on the factual assertion made. For example, the Local Defendants dispute PSUF ¶ 24 which discusses the October 11 IEP meeting in which Plaintiffs assert that the District refused to discuss the Porters' October 11, 1999 proposal. The Local Defendants do not dispute that the proposal was not discussed at the meeting or that the Porters requested that it be discussed at the meeting and the District declined to do so. Instead, the Local Defendants assert that the District did not "refuse" to discuss the proposal, it just "chose" to discuss something else.

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[28] These exhibits contain a narrative of the IEP meeting, which is merely a summary written by a District employee during the IEP meeting, not a verbatim transcript.

Despite this linguistic hair splitting, the fact remains that the proposal was not discussed because the District would not discuss it. Thus, the purported dispute does not create a triable issue because it is nothing more than a mere quibble.

4. The Local Defendants' Mischaracterizations Fail to Create Issues of Fact for Trial

There are several instances where the Local Defendants blatantly misrepresent evidence in an effort to make it appear that there is a factual dispute where none exits. For example, PSUF ¶¶ 43(a)-(d), citing the 2001 CDE Report's, states that the CDE found that the District failed to comply with the SEHO's 1999 order because it neither provided the required "remedial instruction in areas of academic deficit" nor created and implemented a compensatory services plan.

Again, the Local Defendants dispute this fact. In support, they quote the CDE Report. The quotation provided, however, omits key words in order to distort the meaning. The Local Defendants represent the CDE Report language as stating that the District "offered after school tutoring, [and that] there is no evidence that a compensatory services plan was agreed to . . . " (LD SGI ¶ 43(a)). The CDE report actually states that: "While there is evidence that the District offered after-school tutoring, there is no evidence that a compensatory services plan was agreed to and implemented." (Pl. Exh. 5 at 00036). It appears that the Local Defendants manipulated the quotation to support an argument that they were without fault for not providing the remedial instruction because the after school tutoring offered constituted a compensatory services plan which was not agreed to. It is clear, however, that the report is drawing a clear distinction between the remedial services – which were offered, accepted, and never implemented – and the compensatory education plan – which was never even offered. This interpretation of the Report is consistent with the Report's "Corrective Action No. 2" for allegation number one, which gives the District 15 days to "provide assurance that the student's IEP is being implemented in its entirety, including, but not limited to: weekly counseling sessions, after-school tutoring by a qualified special education teacher," as well as Corrective Action No. 4 which orders the District to hold an IEP that provides for the compensatory education specified in the 1999 SEHO order. (Id.).

Counsel for the Local Defendants is undoubtedly familiar with the CDE's 2001 Report and its meaning. Nevertheless, the Local Defendants provide the Court with citations out of context in order to mislead this Court into accepting a erroneous interpretation of the Report's findings and corrective action orders. The effort has failed. The Local Defendants are reminded that they have an obligation not to engage in conduct "to harass or to cause unnecessary delay or needless increase in the cost of litigation." See FED. R. CIV. P. 11. If the Court concludes that future pleadings have been prepared to achieve such an improper goal, the Court will consider issuing an order to show cause why sanctions should not be imposed.

5. Affirmative Defenses with No Basis in Law or Fact Cannot Create A Triable Issue

Finally, when all else fails, the Local Defendants purport to dispute a fact that is obviously not in dispute, by asserting an affirmative defense that has no basis in law or fact. The arguments in support of the Local Defendants' affirmative defenses are discussed at length *infra* and therefore will not be discussed here. It should be noted, however, that the statement of genuine issues format is not the proper place for advancing arguments or affirmative defenses. The parties are given ample opportunity to advance their positions in their briefs.

IV.

PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGEMENT AGAINST THE LOCAL DEFENDANTS

Plaintiffs' first two claims are stated against the Local Defendants for their failure to provide Dashiell with a FAPE and to adequately compensate him for past denials of this educational right. The undisputed facts establish that Plaintiffs are entitled to judgment on these claims as a matter of law.

A. DEFINITIONS

To understand the analysis, one must understand the terminology used in this relatively new and developing area of the law. Accordingly, the Court provides a brief review of the nomenclature. Under both and IDEA and California state law, children with disabilities are entitled to a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1400(d); CAL. EDUC. CODE § 56000.

FAPE is defined as "special education" and "related services" that are available at no charge, meet state educational standards, and conform to the student's "individualized education plan" ("IEP"). 20 U.S.C. § 1401(8). Both procedural and substantive violations can result in the denial of a FAPE. Procedural violations which result in the loss of educational opportunity or which seriously infringe parents' opportunity to participate in IEP formation result in the denial of a FAPE. W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992). The standard for determining whether a FAPE has been substantively provided involves three factors: (1) whether the IEP offer was designed to address the student's unique needs; (2) whether the offered services would provide educational benefit to the student; and (3) whether the services conform to the IEP and are provided in the least restrictive environment. Bd. Of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982).

An IEP must include an assessment of the present level of performance of the child, a statement of annual goals and short-term instructional objectives, specific services to be provided, the extent to which the child can participate in regular education programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. 20 U.S.C. § 1401(a)(19).

"Special education" is defined as specially designed instruction to meet the unique needs of the student. 10 U.S.C. § 1401(25). "Related services" include transportation and other services that may be required to allow a child to benefit from public education. 20 U.S.C. § 1401(17). California Education Code § 56363(a) similarly provides that designated instruction and services ("DIS"), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional programs."

B. Plaintiff's Motion for Summary Judgment on the First and Second Causes of Action Against the Local Defendants are Meritorious

Plaintiffs' first cause of action seeks injunctive relief and compensatory education for the District's denial of a FAPE due to its failure to comply with the 1999 SEHO order. Plaintiffs' second cause of action also seeks compensatory education and injunctive relief against the Local Defendants because of the District's failure to comply with the CDE's 2001 Report Corrective Actions Order, which Plaintiffs contend also denied Dashiell a FAPE.

1. Plaintiffs' First Cause of Action

The 1999 SEHO decision found that the District had denied Dashiell a FAPE, and ordered the District to convene an IEP meeting within thirty calendar days of the date of the decision to develop an IEP that included a compensatory education program to supplement Dashiell's education program during the 1999 to 2000 school year. Although a school district may appeal a hearing office decision that it had denied a student a FAPE, the law is clear that as soon as that decision is issued, it is binding on the school district unless and until it is reversed on appeal. Burlington v. Dept. of Ed., 471 U.S. 359, 372 (1985); CAL. EDUC. CODE § 56505(g); 34 C.F.R. § 300.661(c)(2)(i) (An administrative decision is "binding," notwithstanding the right of the party to appeal. If the school district does not appeal, the hearing office's decision becomes final); 20 U.S.C. § 1415(i)(1)(A). Thus, once a due process hearing has taken place and a SEHO order has issued describing the requirements of a FAPE for a particular student, a school district must implement the SEHO decision to meet the requirements of state and federal law. Failure to comply with the order constitutes failure to provide a FAPE.

(A) The District's Procedural Violations and Failure to Develop an IEP that Included Compensatory Education, as Ordered by the SEHO Constituted a Denial of FAPE

The Local Defendants failed to provide a FAPE because they failed to comply with the SEHO order. Most significantly, the Local Defendants failed to develop and implement an appropriate IEP for Dashiell.

In Bd. of Ed. v. Rowley, the U.S. Supreme Court explained that when ruling on the appropriateness of an IEP, the inquiry is two fold. 458 U.S. at 206-07. First, the court asks if the state complied with the procedures set forth in the Act. Id. Second, the court asks if the IEP developed through the IDEA's procedures is reasonably calculated to enable the child to receive educational benefit. Id. This emphasis on procedural compliance is fundamental to assuring that the substantive requirements of the IDEA have been met. Indeed, the Rowley Court noted that Congress placed "every bit as much emphasis on upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." Id. at 205-06.

Thus, in this case, the threshold inquiry for the Court is whether the District complied with the procedural requirements of the IDEA with respect to the September and October 1999 IEPs developed subsequent to the 1999 SEHO order. The Ninth Circuit has held on more than occasion that procedural violations can be sufficient, in and of themselves, to constitute a denial of a FAPE. Shapiro v. Paradise Valley USD, 317 F.3d 1072, 1079 (9th Cir. 2003) (ruling that procedural violation resulted in denial of a FAPE); Amanda J. v. Clark County School Dist., 267 F.3d 877, 892 (9th Cir. 2001); W.G. v. Bd. of Trustees Sch. Dist., 960 F.2d 1479, 1484 (9th Cir. 1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE. However, procedural inadequacies that result in loss of educational opportunity or seriously infringe the parent's opportunity to participate in the IEP formulation process, clearly result in denial of a FAPE.").

The 2001 CDE report details a myriad of procedural and substantive violations committed by the District with respect to the IEP meetings it conducted between the date of the 1999 SEHO order and the date of the 2001 CDE order. For example, the District failed to have a regular general education teacher participate in the September 13, 1999 IEP meeting as required by 34 C.F.R. § 300.344. (SUF ¶ 18(e); Pl. Exh. 5 at 00057); 20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.347(a)(2); CAL. EDUC. CODE § 56341(b)(2). Under W.G. v. Bd. of Trustees, this alone is such a serious procedural violation that any IEP developed at that meeting may be invalid. W.G., 960 F.2d at 1484-85.

In addition, the District did not conduct the September 1999 IEP meeting in accordance with federal and state law because: (1) Dashiell's IEP did not include a statement regarding his then present level of performance related to areas of academic deficit,[29] (id. ¶ 18(a)); see also 20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a)(1); CAL. EDUC. CODE § 56345(a)(1)(A); 5 C.C.R. § 3040(c); (2) Dashiell's IEP did not include a statement of measurable goals, including benchmarks or short-term objectives, related to the compensatory education that would be provided to remedy his areas of academic deficit, (PSUF ¶ 18(b)); 20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.347(a)(2); CAL. EDUC. CODE § 56345(a)(2); 5 C.C.R. § 3040(c); (3) Dashiell's IEP did not include a statement of how his progress in areas of academic deficit would be measured, (PSUF ¶ 18(c)); 34 C.F.R. § 300.347(a)(7)(i); CAL. EDUC. CODE § 56345(a)(7); and (4) Dashiell's IEP did not include a statement of how

[29] The Local Defendants contend that the Coordinator of Special Education offered to give Dashiell a placement test using the Stanford Reading Assessment comprehension to assess his needs. (LD SGI ¶ 18(a)). This statement proves the point. There would have been no need to offer to conduct the test if Dashiell's present level of performance was already known and a statement of his level of performance was included in the IEP. In any event, what occurred at the meeting is irrelevant to the issue of what was actually included in Dashiell's IEP.

Dashiell's parents would be regularly informed of his progress in areas of deficit. (PSUF ¶ 18(d)); 20 U.S.C. § 1414(d)(1)(A)(viii); 34 C.F.R. § 300.344(a)(2).

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The 2001 CDE decision also found that with respect to the various IEP meetings conducted after the 1999 SEHO order, the District failed to: (1) provide the written notice required under the IDEA; (2) "ensure that the student's IEP included current academic goals and objectives between December 9, 1997 and the date of the issuance of the CDE decision;" (3) assess Dashiell in all areas of suspected disability; and (4) "adhere to the requirements for conducting IEP team meetings to develop, review, and revise the IEP of a child with a disability." (Pl. Exh. 5 at 00040-43, 00054-57).

The Court concludes that these procedural failures, which occurred after the 1999 SEHO order, deprived Dashiell and his parents of important rights rendering invalid the September and October of 1999 IEPs. Indeed, as a result of these multiple procedural violations, the CDE concluded in 2001 that the last valid IEP that was in place for Dashiell was the one developed in December of 1997.

In addition, the SEHO's 1999 decision also ordered the District to develop an IEP for Dashiell that included an appropriate compensatory program. Because the District failed to follow the legally mandated procedures for conducting an IEP meeting with regard to the basic special education services to which Dashiell was entitled, it follows that the District also failed develop an IEP with regard to compensatory services.

(B) The District Failed to Create an IEP for Dashiell as it was Ordered to by the SEHO by Either Obtaining Parental Consent or Obtaining Administrative Adjudication that its Proposed IEP was Appropriate

An IEP must include an assessment of the present level of performance of the child, a statement of annual goals and short-term instructional objectives, specific services to be provided, the extent to which the child can participate in regular education programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. 20 U.S.C. § 1401(a)(19). The IEP's created by the District, the compensatory education services offered by the District, and the CDE's 2004 "plan" do not contain any of these required items.

There are only two ways that an IEP can be created for a student. The first is for the parents and the school district to reach an agreement on the terms of the IEP. However, if there is no agreement, this does not excuse a school district from its obligation to create an IEP. Under California law, if the parent does not agree to the IEP, the school district is required to take affirmative steps to ensure that the child receives a FAPE. CAL. EDUC. CODE § 56346(b)-(c); Doe v. Maher, 793 F.2d 1470, 1490 (9th Cir. 1986) (holding that if there is no agreement on the terms, "the agency has a duty to formulate the plan to the best of its ability in accordance with information developed at the prior IEP meeting, but must afford the parents a due process hearing in regard to that plan"). If the parent consents to part, but not all, of the components the agreed to components "***shall*** be implemented so as not to delay providing instruction and services to the pupil." Id. In addition, the school district must implement the agreed upon portions of the IEP as soon as possible following an IEP meeting. 34 C.F.R. § 300.342(b)(1)(ii).

If the local educational agency determines that the portions of the program to which the parent did not consent, or all of the program if the parent did not consent to any part of the IEP, is necessary to provide the child with a FAPE, it is required to initiate due process hearing procedures to override the parent's refusal of consent. Id.; see also Doe by Gonzales, 793 F.2d at 1490. During the pendency of the hearing, the local educational agency may try to resolve the disagreement informally by convening a parent conference or by participating in mediation. However, if the matter goes to hearing, the parties are bound by the decision resulting from the case. Id. Therefore, if the hearing officer determines that all or any part of the IEP to which the parent did not consent is required for the child to receive a FAPE, those portions of the IEP may be implemented over the parent's refusal of consent. Id.

Although the District conducted IEP meetings in September and October of 1999 after receiving the June 1999 SEHO order, neither meeting resulted in a full agreement on an IEP because, while the Porters consented to the two concrete offers made by the District as to DIS counseling and after-school tutoring, they made clear that they did not agree that the IEPs constituted an appropriate and complete compensatory services plan. (See e.g., Pl. Exhs. 8 & 9). Specifically, the Porters did not agree that the District made any effort to determine the nature and extent of services necessary to effectuate the purpose of compensating Dashiell for previous denials of a FAPE. (See Pl. Exh. 8). Rather, the District simply offered some services, without any consideration as to whether what they offered would, in fact, remedy Dashiell's deficits. (Id.). The Porters believed that in order to develop an appropriate compensatory program for Dashiell it was necessary to assess the extent of his deficit, develop goals and objectives to close the gap, and develop procedures to measure his progress. (Id.). 20 U.S.C. § 1401(a)(19) requires an IEP to address these issues.

Because the Porters did not agree that the services offered constituted a compensatory services plan (although they agreed to the implementation of the services offered), and the District did not implement the agreed upon services or initiate due process hearing procedures to override the Porters' refusal of consent, no compensatory services plan was implemented as required by the June 1999 SEHO order. (See 2001 CDE Report at Pl. Exh. 5 at 00036).

(C) The District Failed to Provide Dashiell with Remedial Instruction in Areas of Academic Deficit or Social Skills as Ordered by the 1999 SEHO Order and as it Agreed to do in Various IEP Meetings

(i) The September and October 1999 IEP Meetings

Even though Dashiell's parents did not agree that the IEPs developed at the September and October 1999 IEP meetings were completely appropriate, either procedurally or substantively, they nevertheless consented to have the District begin providing the compensatory services it offered. The District did not implement the services agreed upon in the September and October 1999 IEP meetings as soon as possible; instead, only a small fraction of the services consented to was ever implemented. Thus, the District failed to comply with CAL. EDUC. CODE § 56346(b)-(c).

The District cannot justify its failure to provide Dashiell with compensatory education on the ground that the Porters did not agree to all of the parts of the IEPs it proposed because if it believed that the program it offered Dashiell was appropriate, it had an obligation, under CAL. EDUC. CODE § 56346(b)-(c), to act by filing for a due process hearing to seek administrative approval of the IEP. Because CAL. EDUC. CODE § 56346(b)-(c) places the burden on the District, the District, not the Porters, bears the responsibility for its own failure to provide Dashiell with a compensatory services plan. This issue will be briefly addressed, for the second time, in the discussion of the Local Defendants' affirmative defense provided below.

(ii) The IEP Meetings Held After the 2001 CDE Report

After the 2001 CDE order was issued, the Porters agreed to have the District provide compensatory services to Dashiell pursuant to the IEPs created on May 15, 2001 – which was accepted without reservation – and September 19, 2001. In both instances, the services offered were intended to address the denial of a FAPE found in the 1999 SEHO order and the need for compensatory services described in the 2001 CDE order. Under those IEP agreements, Dashiell was to receive twenty hours of reading tutoring during the remainder of the 2000-2001 school year, of which he received only fourteen hours. Under the same May IEP, Dashiell was to receive 132 sessions of after school reading instruction during the 2001-2002 school year, but, in fact, he received none.

At the other various IEP meetings held during the 2001-2002 school year, the District acknowledged that it was not providing the agreed-upon compensatory education to Dashiell, purportedly because of staffing difficulties. (See e.g., PSUF ¶¶ 60, 61). However, the law is clear that lack of staff is not an acceptable excuse for failure to implement an IEP. This principle is established in interpretive letters from the Office of Special Education Policy ("OSEP"), "the agency charged with principal responsibility for administering the IDEA," whose interpretations of applicable statutes and regulations are entitled to deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). In November 1994, the OSEP issued a memorandum which stated that "[t]he lack of adequate personnel or resources cannot be used as an excuse by the district to relieve them of their obligations to make FAPE available to disabled students in the LRE. The public agency must ensure the supply of a sufficient number of teachers who are qualified, with the needed aids and supports to provide such services in regular education environments." (OSEP Memorandum 95-9 Quoted in Mot. at 16).

The unequivocal nature of a school district's responsibility to implement an IEP was discussed in Manalansan v. Bd. of Ed. of Baltimore City, 2001 U.S. Dist. LEXIS 12608 *37-38 (D. Md. August 14, 2001). There, the school district argued that it should be excused from failing to provide an aide at all times specified in the student's IEP because it made "a good faith effort" to provide the aide. Id. The Court noted that while it is true that the regulations mention "good faith," the regulations ***mandate*** that services are provided in accordance with the IEP and that a "good faith effort" be made to help the child meet his *objectives*. 34 C.F.R. § 300.350. Thus, the regulation plainly shows that these are two separate requirements that cannot be merged and encompassed by a "good faith effort" standard. The court squarely rejected the district's defense, noting that the provision of services is within the control of and is the obligation of the school district because the district agreed that the services listed in the IEP were the ones required in order to provide the child with a

FAPE. Id. Thus, "[a] 'good faith effort' does not meet the statutory and regulatory command." Id.

Indeed, the District here was involved in each IEP meeting and was in the best position to know its own resources before agreeing to provide services. Thus, because the District agreed in certain IEPs to provide a particular level of services, "the court must hold the school to its word." Id. at 35. Even if the circumstances make it truly impossible for the program agreed to at the IEP to be implemented, this does not excuse a school district from its responsibility to provide a student with a FAPE. It must find alternative ways of provide a FAPE. For example, in this case, the District could have reimbursed the Porters for utilizing outside services if it was unable to provide what Dashiell needed.

2. Plaintiffs' Second Cause of Action

Under 34 C.F.R. § 300.600, the Department of Education must assure that school districts comply with state education standards as to what constitutes a FAPE for a disabled student. Thus, if a parent complains to the CDE about a school district's denial of a FAPE, the CDE must investigate and issue a report detailing its findings and conclusions and ordering the state to take corrective actions, where appropriate. 34 C.F.R. § 300.600. Because the purpose of the corrective actions is to bring the district into compliance with the law, logically, failure to implement the corrective actions results in ongoing violations of law. Indeed, such a violation is serious enough to permit the California Department of Education to withhold all or part of a district's state or federal fiscal support and to condition the receipt of future funds on compliance. 5 Cal. Code Reg. § 4670(a)(1)(2). Moreover, the CDE may proceed to court to enforce its orders. Id. at § 4670(a)(3). Just as with a hearing office order, once the CDE has made a determination as to what the school district must do in order to provide a student with a FAPE, the school district must implement corrective actions ordered by the CDE, because to do otherwise would, in and of itself, constitute a denial of a FAPE. See 20 U.S.C. § 1415(i)(1)(A) (stating that such decisions are final).

(A) The District Failed to Implement Dashiell's IEPs and Failed to Provide the Compensatory Education Ordered by the CDE in 2001 and by the SEHO in June 1999

There were numerous allegations addressed in the 2001 CDE Compliance Report. Allegation One focused on the District's failure to implement Dashiell's IEP's, including the failure to provide weekly DIS counseling and the failure to provide after-school tutoring by a qualified special education teacher. The District was ordered to provide the CDE with assurance that it was implementing Dashiell's IEP "in its entirety" within fifteen days of the date of receipt of the Compliance Report. It is undisputed that the District did not comply.

The District was not only ordered to implement Dashiell's existing IEP, but was also ordered to hold an IEP meeting within forty-five days of the receipt of the report in order to develop a new IEP for Dashiell, which was to include DIS counseling and "remedial instruction in areas of academic deficit" pursuant to the SEHO order. Although the District held IEP meetings on May 15, 2001 and September 19, 2001, at which it developed IEPs that provided compensatory education for Dashiell, the District never developed a compensatory education *plan* as it was ordered to by the SEHO in June 1999. Moreover, even though Dashiell's parents agreed to these IEPs, the District failed to implement them by providing Dashiell with the agreed-upon compensatory education. Thus, this failure also violated the 2001 CDE Compliance Report Order.

(B) The District Failed to Provide Additional Compensatory Education or to Develop a Compensatory Services Plan as Ordered

The 2001 Report also addressed the separate allegation that the District had failed to develop a procedurally compliant IEP for Dashiell since 1997. As a corrective action for this additional violation, the CDE ordered that the District was to create a plan for providing the compensatory education ordered by the SEHO and was to consider providing ***additional*** compensatory instructional services to make up for the District's failure to develop and implement an IEP between December 1999 and the date of the implementation of a new IEP. To establish compliance, the District was required to provide the CDE with a copy of the resulting IEP, including the compensatory education services plan. The District submitted the May 3, 11, and 15, 2001 IEPs to the CDE as evidence of its compliance, but these IEPs do not qualify as a compensatory services plan and do not address Dashiell's need for additional compensatory education at all.

In addition, the District not only ignored the assessment by Dr. Mel Levine's Student Success Center for Dashiell, which it paid for and obtained following the May 2001 IEP meeting, it also ignored a document produced by the Porters at the May 2002 IEP meeting, addressing the compensatory education ordered by the SEHO in 1999 and the compensatory plan ordered by the 2001 CDE Compliance Report Order. Moreover, at the October 14, 2002 IEP meeting, the District and the Porters reached an agreement on twenty-eight goals and objectives that were to be implemented during Dashiell's ninth grade school year, but the District reneged on these agreed upon goals and objectives by unilaterally reducing them to six.

Finally, the District would not respond to letters from the Porters requesting a written plan – a document to which the Porters were legally entitled. 20 U.S.C. § 1415(b)(1)(C) (requiring written notice to parents when an educational agency proposes to initiate or change the educational placement of a disabled child). The Ninth Circuit has expressly held that a school district has the responsibility of making sure that all details of an offer of services are provided in writing, stating "[w]e find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced vigorously." Union Sch. Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir. 1994). Indeed, one purpose of the writing requirement is to assist parents in presenting complaints with respect to any matter relating to the educational placement of the child. 20 U.S.C. § 1415(b)(1)(E).

In sum, the District persisted in its refusal to develop a comprehensive compensatory education plan for Dashiell. The failure of the District to develop a compensatory services plan is perhaps not surprising given Special Education Director Thompson's testimony that she did not have a specific understanding of the phrase "compensatory services plan." (PSUF ¶ 66(a)-(b)).

V.

THE LOCAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT IS NOT MERITORIOUS

Local Defendants do not truly dispute any of the determinative facts presented by Plaintiffs. For example, Local Defendants do not contend or show that the District provided Dashiell with compensatory education. Rather, they assert that the District was "prevented" from doing so – thereby admitting that it, in fact, did not do so. Thus, the Local Defendant's cross motion for summary judgment on the Porters' first claim for relief is really a motion for summary judgment on the Local Defendants' affirmative defense to that claim styled as "alternative causation." As already discussed, the law is clear that there are no excuses, explanations, or justifications that will suffice to excuse the District from its obligation to provide Dashiell with a FAPE. Indeed, the Local Defendants assert three versions of their affirmative defense, but the Local Defendants have not provided, and the Court has been unable to locate any legal authority supporting any one of them. Nevertheless, the proposed affirmative defenses are briefly discussed below.

A. The Local Defendants' Affirmative Defenses Based on the Lack of Consent or the Revocation of Consent are Without Merit

In their cross motion, Local Defendants originally asserted that the District was "prevented" from providing special education services to Dashiell because the Porters did not consent to any of the IEPs in which the District offered compensatory education to Dashiell. The Local Defendants supported this position by the simple expedient of omitting any reference to those IEPs that the Porters, in fact, consented. As is clear in Section II of this Order, it is uncontroverted that there are many IEPs to which the Porters either consented without reservation or consented with a reservation of rights. The Local Defendants tactic of simply neglecting to inform the Court of these IEPs in their cross motion does not eradicate them from the factual landscape of this dispute.

In Plaintiffs' motion for summary judgment, the Local Defendants were confronted with the evidence of IEP's to which the Porters consented, and so were foreclosed from reasserting their argument that the Porters did not consent to any of the IEPs. Therefore, the Local Defendants were forced to come up with a new theory, so the argument underwent a metamorphosis. The Local Defendants now concede that the Porters did accept various IEPs, but contend that the Porters revoked their consent, thus relieving the District from any obligation to provide the services to which the Porters had previously consented. For example, the Local Defendants' excuse for not providing Dashiell with the compensatory education agreed upon in the May 2001 and September 2001 IEPs is that although the Porters gave their consent in May, the District interpreted the Porter's September 19, 2001 letter as a revocation of consent and therefore the IEP was not implemented for Dashiell's eighth grade year. (LD SGI ¶ 51). From the plain language of the letter, stating "[w]e will consent to the implementation of the September 19, 2001 IEP," the Porters clearly consented to the compensatory education offered. (Pl. Exh. 52 at 00144-45). The rest of the pertinent portion of the letter merely expresses concern that the District could not actually provide the promised services and therefore put the District on notice that the Porters planned to file a compliance complaint with the CDE. (Id.). The Local Defendants contend that the letter "issued a challenge to the entire compensatory plan," thereby relieving it of any obligation to provide the services.

This interpretation of the Porter's letter is not only wholly unreasonable but also misrepresents the content of the letter. In essence, this manifestation of the Local Defendants' affirmative defense is that there must be complete capitulation by a family to the District's "plan" and a waiver of all rights to complain or disagree or the child is entitled to nothing. The Local Defendants have pointed this Court to nothing in the IDEA consistent with such a proposition. Nor has this Court been able to locate any authority supporting the notion.

In short, it seems that the District has endeavored to use the power it has over Dashiell's education as a means of retaliating against the Porters for their criticisms of, and challenges to, the District. One could readily conclude that the District's subsequent failure to provide the services to which the Porters consented was retaliatory because when a District staffer was asked during her deposition in what intentional acts the Porters engaged to "prevent" the District from providing compensatory education and remedial instruction to Dashiell, the staffer responded that she did not like Mrs. Porter's "tone." (Jones Depo. Exh. 292 at 01111-01113). Specifically, the District staffer's full response was:

> The tone of the document, okay, was very frustrating for staff to see, okay? And specifically, in parts, you know, it uses language that could be considered demeaning, and in the process of doing that presented a wall rather than a bridge towards working together.

(Id.). This reference to the "tone" of the Porter's letter suggests that the District resented the Porters' actions, and when the Porters took any position other than complete acquiescence to the District's proposals, the District characterized that disagreement as "preventing" it from implementing the legally mandated services.

Perhaps seeing the futility of their revocation argument, the Local Defendants, in reply to Plaintiffs' opposition to the cross motion, take yet another position, putting a new spin on the revocation argument. The Local Defendants argued that it is not enough that the parents consent to the "***carrying out of the activity***," *i.e.*, the provision of compensatory education services. Rather, unless the Porters also "agreed" that the services offered constituted a "compensatory services plan" that complied with the 1999 SEHO order and the 2001 CDE Report, their "consent" was not sufficient to actually require the District to provide the services it offered and to which the Porters consented. (LD Reply at 4). The District's position that the Porters must not only consent to the services offered, but agree that the offered services are completely appropriate to meet Dashiell's needs and fulfill the District's responsibility to comply with state agency orders and state and federal law, before it is obligated to provide services to a disabled child, again finds no support in law.

In fact, the only authority the Local Defendants cite in support of their argument is the Webster Dictionary definition of consent, which is curious in light of the fact that there is a statutory definition of "consent" under both state and federal law. The IDEA and California's Education Code both define "consent" for special education purposes as meaning that, "the parent or guardian understands and agrees in writing to the ***carrying out of the activity*** for which his or her consent is sought." CAL. EDUC. CODE § 56021.1; 34 C.F.R. § 300.500 (emphasis added).

From a policy standpoint, this definition makes perfect sense because it may be that the District has offered the student thirty minutes per week of services, while the parent really believes the child needs sixty. The law permits the parent to agree to thirty – thereby allowing the student to have something rather than nothing – but in the meantime file for due process in order to force the district to increase the services. If this were not the case, the parent would face the Hobsian choice of agreeing to insufficient services or having their disabled child go without any services at all.

In sum, the Local Defendants' "alternative causation" affirmative defense is a misplaced effort to shift the blame for the District's failure to develop an IEP between 1997 and 1999, to provide the services agreed to in subsequent IEPs, to comply with the 2001 CDE decision, and to fashion a compensatory education plan for Dashiell from the District to the Porters. Indeed, this defense is somewhat galling. Regardless of the conduct of the parents of a disabled child, when a child goes without special education services for years on end, there can be no one to blame but the entity in control of providing the services – the school district. If the District did not get the consent it needed, it clearly had both a right and an obligation, as a matter of law, to get approval for the IEPs from the state agency to implement them, or implement at least those services to which it the parents consented. CAL. EDUC. CODE § 56346(b)-(c). It did neither.

B. The Local Defendants' Affirmative Defense Based on Errors Made by the State Agencies in their Decisions is Without Merit

In addition, in defense of the Plaintiffs' motion, many of the "disputes" raised in the Local Defendants' Statement of Genuine Issues appear to challenge the conclusions reached by the CDE and the SEHO. The Court is disinclined to entertain the District's challenge to the state agency's determinations as having been erroneous because the District has neither appealed the agency's decisions nor asserted cross-claims against the state agency in this action. These agreements are also rejected because, as discussed *supra*, the District is a subdivision of the state and is required to abide by final state agency orders unless it obtains a reversal of the state agency's decision on appeal. Thus, any potential errors do not give rise to factual issues for trial.

In all events, the District has presented no admissible evidence that persuades the Court that the state agency erred in any respect in concluding that the District was in violation of state and federal law. Indeed, much of the evidence relied upon by the Local Defendants is inadmissible and has been rejected by the Court on Plaintiffs' objections thereto, and not considered. For example, as discussed *supra*, many of the Local Defendants' exhibits are "authenticated" by Ms. Thompson's unsigned affidavit, the exhibits are not true and correct copies of the originals. In addition, Ms. Schneider's declaration is also unsigned and therefore not made under penalty of perjury, it fails to reflect that she is a certified expert, and it is clear from the face of her document that she lacks the personal knowledge to make some of the assertions made in her declaration. The Local Defendants have cured some of these deficiencies by obtaining new declarations that are more limited in scope and have resubmitted some complete documents, but even that new evidence does not support a basis for concluding that the state agencies erred in making findings against the District. To the contrary, the weight of the evidence shows that the state agencies may have erred in some of the determinations made in the District's favor. (See e.g., footnote 6, *supra*).

Accordingly, summary judgment against the Local Defendants is appropriate. Plaintiff's motion is therefore **GRANTED** and the Local Defendants' cross motion is **DENIED**.

VI.

PLAINTIFFS ARE ALSO ENTITLED TO SUMMARY JUDGMENT AGAINST THE STATE DEFENDANTS

As demonstrated below, under the law, the ultimate responsibility for making sure that students in the State of California receive a FAPE rests with the CDE. Although it is true that the District repeatedly flouted the State's authority by failing to comply with two state agency orders, it was only successful in doing so because of the CDE's inattention.

A. The CDE Failed to Appropriately Exercise its Supervisory Responsibility

The IDEA, regulations promulgated thereunder, and legislative history all make clear that the state educational agency, in this case the CDE, has the ultimate responsibility for ensuring that all children with disabilities within the State of California receive a FAPE. 20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.600(a); S. Rep. No. 94-168, at 24, reprinted at 1975 U.S. Code Cong. & Ad.News, 1425, 1448; Honig v. Doe, 484 U.S. 305 (1988); Kerr Center Parents Assoc. v. Charles, 897 F.2d 1463, 1470 (9th Cir. 1990) (citing predecessor statute to 20 U.S.C. § 1412(11)(a)). As part of its general supervisory responsibility under the IDEA, the CDE has the obligation to monitor and enforce compliance with the IDEA, including provision of a FAPE by local educational agencies. 20 U.S.C. § 1412(11)(a); 34 C.F.R. § 300.600(a); CAL. EDUC. CODE §§ 56000, 56024, 56040, 56043(n) & (q), 56045, 56048; 5 CCR §§ 3000, 4600-4671. The CDE is obliged to ensure that Dashiell receives the compensatory education ordered pursuant to the 1999 SEHO order and the additional compensatory relief discussed in the 2001 CDE Compliance Report Order. 20 U.S.C. § 1412(11)(a); 34 C.F.R. § 300.600(a); 5 CCR §§ 4600, 4650(a)(viii)(B), 4651, 4660-4671.

When a local education agency, like the Manhattan Beach Unified School District, is unable or unwilling to establish and maintain programs in compliance with the IDEA, by law, the CDE is responsible for directly providing services to the disabled child. 20 U.S.C. § 1412(a)(12)(B)(ii). Upon receipt of notice that a local educational agency has taken, or refused to take action, as required by the IDEA, a state educational agency, may be held liable under the IDEA for its failure to thereafter ensure that the local educational agency complies with the IDEA. Gadsby v. Grasmick, 109 F.3d 940, 953 (4th Cir. 1997). In this case, the CDE is liable for its failure to satisfy its legal obligation to ensure that the District complied with the IDEA by providing Dashiell with a FAPE as it was ordered to by the SEHO and CDE.

B. THE CDE DID NOT TAKE APPROPRIATE MEASURES NECESSARY TO ENSURE THAT THE DISTRICT IMPLEMENTED THE 1999 SEHO ORDER AND PROVIDED DASHIELL WITH THE RELIEF ORDERED UNDER THE 2001 CDE COMPLIANCE REPORT ORDER

1. The CDE Did Not Require the District to Prove Actual Compliance

The CDE's 2001 Report ordered the District to develop a current IEP addressing Dashiell's complete educational program, including, but not limited to: goals and objectives in all areas of identified need; social skills counseling; and remedial instruction in areas of academic deficit pursuant to the 1999 SEHO order. In order to comply with this corrective action order, the District was only required to provide "a copy of the resulting IEP." The 2001 Report orders also required the District to address Dashiell's potential need for additional compensatory education beyond that ordered in the 1999 SEHO order, to make up for the District's failures to develop and implement an updated IEP since December 1997. If the IEP team determined that Dashiell needed such additional compensatory instructional services, the new IEP was to include a plan to provide for them. To comply with this corrective action order, the District was required to provide "a copy of the resulting IEP, including the plan for [additional] compensatory services, if any."

By requiring nothing more than delivery of a new IEP document ("paper compliance"), the CDE allowed the District to create the impression of compliance without actually meeting Dashiell's educational needs as required under the IDEA. The CDE cannot claim that it was unaware of this problem, since it was identified and raised by its own counsel. Just two days before the 2001 report was issued, Mr. Hersher, Deputy Counsel for the Department of Education, asked: "On the second corrective action for Allegation 1, I wondered why you were asking for assurances about IEP implementation, rather than evidence of actual implementation. Maybe they need more than 15 days, ***but don't we want action instead of promises to act?"*** (PSUF ¶ 215) (emphasis added). Mr. Hersher's concern applies with equal force to all the corrective actions because, under the terms of the CDE's order, compliance with any of them could be demonstrated by the District by simply sending a document to the CDE without any proof of actual delivery of the services. This case conclusively demonstrates that counsel's concern was not merely hypothetical; the District reported the development of an IEP without actually providing Dashiell with services. For some period of time, the CDE accepted the report as evidence that the District was in compliance with its legal obligations under state and federal law when the truth was quite the opposite.

The primary allegation in the Porters' first complaint to the CDE was the District's failure to provide compensatory education to Dashiell, as ordered in 1999 by the SEHO. Because the CDE failed to require logs or any other form of evidence that such services were actually being provided, it had no way of verifying whether the

District was compliant with CDE orders and state and federal law. Where the very issue before the CDE was the District's sustained noncompliance with the requirements of the IDEA and prior orders for corrective action, the CDE's willingness to accept the unsubstantiated word of the recalcitrant district invited further neglect of the District's legal obligations. By accepting the word of the District which had so thoroughly failed to meet its legal obligations to Dashiell, the CDE failed to meet its legal obligation of insuring that Dashiell was receiving a FAPE. Indeed, this failure is best evidenced in the CDE's own 2004 Report, which found that the District still had not provided Dashiell with the required compensatory education three years after it had been ordered by the CDE.

In addition, the District submitted documents to the CDE that on their face, failed to satisfy the documentation requirements set forth in the corrective actions orders. The documentation submitted by the District in response to the corrective action orders did not contain a complete educational program, a compensatory services plan or the required follow-up monitoring reports. Nevertheless, the CDE determined that the District had fulfilled its obligations under the 2001 Report and therefore closed the investigation. The State Defendants concede error in this regard by stating that "the case should not have been closed without the required interim monitoring reports having been prepared and sent to the CDE" and that the matter "was prematurely closed without a compensatory services plan having been agreed to by the IEP team." (SD Opp. at 4). Accordingly, the CDE failed to carry out its supervisory responsibilities in this respect as well.

B. THE CDE FAILED TO OPEN A NEW COMPLIANCE INVESTIGATION UPON ITS RECEIPT OF MRS. PORTER'S NEW COMPLIANCE COMPLAINT IN NOVEMBER 2001

Over a period of four months, Mrs. Porter attempted to get the CDE to open a new compliance investigation based upon her allegation that the District was not providing the compensatory education as required by the SEHO and CDE orders. Mrs. Porter's first attempt, her November 2001 letter expressly alleged that the District was not compliant with the orders. The November 2001 letter constituted a "complaint" within the meaning of 5 CCR § 4600(c). A complaint is defined by California law as "a written and signed statement alleging a violation of federal or state law or regulation. Id.; see also 34 C.F.R. § 300.662. Upon receipt of this letter alleging the District's noncompliance with the 2001 CDE Report, the CDE was legally obligated to open a new investigation. 5 CCR § 4650(a)(viii)(B) (mandating that the Superintendent of Public Education directly intervene without waiting for local agency action if the complainant alleges that the local agency has failed or refused to implement a due process order). Instead, the CDE construed the letter as a request for reconsideration and did not open a new investigation.

Such an interpretation of Mrs. Porter's November 2001 letter was unreasonable given that the time limit for filing a request for reconsideration had passed and the letter plainly requested an investigation into the District's failure to comply with the June 1999 SEHO order and the 2001 CDE Report's orders. This interpretation is especially unreasonable in light of the later actions taken by the CDE when the same issues were raised by its own consultant, Mr. Hill. Although Mrs. Porter sent another letter requesting an investigation on January 16, 2002, and Mr. Hill notified the CDE in February 2002 that Mrs. Porter's November 2001 letter was a complaint, the CDE did not open a new investigation until Mr. Hill personally requested, in writing, a new investigation. The State Defendants proffer no explanation why it refused this same relief to Mrs. Porter.

The record before the Court conclusively establishes that the request for a second investigation was meritorious, since the CDE ultimately confirmed the truth of Mrs. Porter's allegations. The 2004 Report expressly found that the Porters consented to the implementation of compensatory services at the May 2001 IEP, the July 2001 IEP, and the September 2001 IEP. (Pl. Exh. 198 at 00475-476). It also found that Dashiell did not receive the compensatory services that the District was obligated to implement pursuant to those IEPs. (Id. at 00476). The Report cites 34

C.F.R. § 300.350(a)(1) setting forth the requirements that the District must provide special education and related services to a child with a disability in accordance with the student's IEP. (Id. at 00457, 00480). Nonetheless, the 2004 Report does not contain a finding that the District failed to implement Dashiell's IEPs dated May 2001, July 2001, and September 2001, with respect to after-school reading and counseling. Clearly, CAL. EDUC. CODE § 56346(a) required the District to implement the services to which the Porters agreed at these IEPs, yet inexplicably the CDE still ignored this issue even in its 2004 Report.

In sum, the CDE failed to fulfill its obligation to ensure that the District complied with the IDEA and provided Dashiell with a FAPE. The findings contained in the 2004 Report constitute overwhelming evidence that the CDE is equally responsible for denying Dashiell a FAPE and the benefits of the special education to which he has been so long entitled from the date of the 2001 Report until today. Indeed, had the CDE not ignored Mrs. Porter's November 2001 request for an investigation and not waited for two years until its own consultant requested further investigation, Dashiell would not have had to wait until March of 2004 for the CDE to take further action to enforce the District's compliance with not one, but two, state agency orders. Because of the CDE's inaction, the Court views it as equally culpable with the Local Defendants in denying Dashiell his state and federal rights to a FAPE.

C. THE 2004 REPORT FAILS TO ADDRESS THE ISSUE OF WHETHER THE DISTRICT AND THE CDE ARE RESPONSIBLE FOR THE FAILURE TO IMPLEMENT THE LEGAL DIRECTIVES OF 1999 SEHO ORDER AND THE 2001 REPORT ORDER

In the 2004, the CDE did not assign responsibility for Dashiell not receiving his compensatory education to which he is entitled. Notably absent from the 2004 Report is a discussion of the extent to which the CDE, itself, is responsible for this protracted non-compliance. Instead, the Report makes a subtly disparaging comment about the Porters by stating that it is impossible for it to determine if it is the District or the

Porters who is responsible for the situation. As discussed above, as between the District and the Porters, the legal responsibility for the District's failure to provide a FAPE rests squarely with the District. The CDE does cite its own general supervisory responsibility under 34 C.F.R. § 300.600(a)(2), but it does not assign itself any responsibility for the repeated failures to provide Dashiell with a FAPE. For example, it does not discuss how it ignored Mrs. Porter's November 2001 and January 2002 letters or the insufficiency of its paper compliance enforcement of its 2001 Report orders. It does mention, however, that the Porters informed the District in writing on a number of occasions that without written documentation detailing the District's proposal for a compensatory services plan, the Porters were simply not in a position to evaluate the District's proposals. (2004 Report at Pl. Exh. 198 at 00477-478). By ordering the development of such a written plan as the primary corrective action in the 2004 Report, the CDE confirmed the reasonableness of the Porter's efforts to attain the District's compliance with the prior state agency orders. Unfortunately, the CDE's belated actions are too little too late.

The undisputed facts now before this Court establish, as a matter of law, that the CDE failed to perform its obligations under state and federal law thus contributing to the denial of Dashiell's right to a FAPE. Accordingly, summary judgment is **GRANTED** against the State Defendants on Plaintiffs' third and fourth claims for relief.

VIII.

THE RELIEF REQUESTED DOES NOT RENDER THIS ACTION MOOT

Plaintiffs' seek an injunction requiring Local Defendants to comply with the SEHO and CDE orders and to begin compensatory education without any further delay. In addition, Plaintiffs' ask the Court to fashion an overall compensatory education plan for Dashiell and order it implemented. Similarly, with regard to the State Defendants, Plaintiffs request that this Court award appropriate compensatory education and pray for an injunction requiring the State Defendants to adopt policies, procedures, and practices, and take appropriate measures necessary to ensure that MBUSD complies with the written decisions and orders issued by the SEHO and the CDE.

Both the State and Local Defendants assert that these requests for injunctive relief are moot. The gist of their argument is as follows, "Plaintiffs' [claims] seek equitable relief. The CDE's 2004 Compliance Report orders equitable relief. Therefore, defendants submit that plaintiff's claims are moot." (Local Def. Mot. at 15; State Def. Opp. at 12). This argument is wholly without merit.[30]

A. This Case is Not Moot Because the CDE's Compensatory Plan Does Not Provide Dashiell With All the Relief to Which He Is Entitled

The 2004 CDE order is insufficient to protect Dashiell's interests for several reasons. First, the CDE's "Compensatory Plan" does not order the District to provide any specific remedial instruction in areas of academic deficit or social skills instruction and/or modeling. As before, the District is simply ordered to develop and implement a compensatory services plan, and is given a deadline to do so. The CDE has given the District approximately ten weeks into the 2004-2005 school year to commence implementation of the compensatory services plan. Thus, even if the District can develop an appropriate plan for Dashiell, he may not receive the compensatory education to which he is entitled for those ten weeks, approximately a quarter of the forty-week school year, assuming that the District even complies with the deadlines established by the 2004 CDE order.

Second, although Dashiell's present level of academic and social functioning is relevant to the nature and extent of his entitled compensatory education, the CDE's 2004 plan fails to specify the content, nature, frequency, and specification of the services to be provided to Dashiell, and instead leaves that determination, once again, to the District. (Pl. Exh. 287 at 01054). Ironically, the District's failure to provide these specifications was one of the reasons the CDE found that the District had not complied with the 1999 SEHO Order and the CDE 2001 Report. Yet, the CDE commits the same violation.

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[30] The Court notes that Local and State Defendants made a similar argument with regard to the 2001 CDE Report when they appeared before the Ninth Circuit. The Ninth Circuit squarely rejected this contention. See Porter, 307 F.3d at 1068, n4.

This seems especially egregious given: (1) the District's noncompliance with the 2001 Report over the past three years; (2) the deficiencies of the documentary evidence that the District delivered to satisfy the CDE's 2001 order; and perhaps most troubling (3) that the "CDE has determined that the District has lacked the expertise and framework to deliver the most effective services to [Dashiell] and has not employed teaching strategies that have proven effective with students with autism spectrum disorders." (Pl. Exh. 287 at 01040). Instead of using it own "panel of experts" to assist the District in the development of a plan and to train the District staff, the CDE delegated its general supervisory responsibility, to unidentified "outside expert consultants" to be selected by the District, which arguably (based on the aforementioned CDE finding) lacks any expertise to even hire the correct consultants. (Id.).

Aside from these structural problems, the plan also fails in a number of acute areas. First, its directive that IEP services shall be supplemented to meet Dashiell's current individual needs and anticipated outcomes, does not describe how these IEPs services are to be supplemented. (Id. at 01054, ¶ 6.A.ii). Second, rather than address how to teach Dashiell algebra, the CDE's solution for his deficits in that area is for the District to seek a waiver of the algebra requirements for high school diploma. (Id. at 01054, ¶6.A.viii.1). Such a solution is not compensatory; it is an abdication of responsibility to teach. Third, providing that Dashiell may continue in drama is not a substitute for compensatory education. (Id. at 01054, ¶6.A.vi.1). Fourth, the limitation of Dashiell's education to the District's "essential standards," is inconsistent with California's annual Standardized Testing and Reporting ("STAR") Performance Reports, which measure a student's mastery of California's content standards and

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require students to be "proficient" in all content, not just Manhattan Beach Unified School District's notion of the "essential standards," in order to graduate with a high school diploma. (Id. at 01054, ¶6.A.viii.1).

Fifth, the CDE orders the District – which lacks expertise and teaching strategies – to develop "activities and to remediate/develop language skills (reading comprehension, listening comprehension, and oral expression)," and "[a]ctivities to continue the development of social skills resulting in appropriate peer-to-peer reciprocal conversation." ((Id. at 01054, ¶6.A.viii.1, 3). However, the CDE fails to define the term "activities," and that term does not appear in the IDEA or California law. Lastly, the CDE's "plan" does not require the development of goals and objectives that can be objectively measured to determine Dashiell's progress with respect to compensatory services to be provided.[31]

In the end, the 2004 Compensatory Plan and Amended Report, provide Dashiell with yet another empty promise. The CDE has repeatedly demonstrated its inability to fashion a compensatory service plan and to ensure that Dashiell actually receives the services to which he is entitled. Thus, there is no reason to believe that the CDE will monitor and ensure implementation now and certainly no basis to believe that the District will comply with anything absent judicial intervention and supervision.

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[31] Plaintiffs also object to the plan on the grounds that it was prepared by individuals who have not been identified by the State Defendants as experts to testify at trial. Plaintiffs have not been given an opportunity to depose these individuals and the "plan" does not constitute an expert witness report. Plaintiffs further object to the "plan" on the ground that it is hearsay, and does not qualify for an exception set forth in FED. R. EVID. 803(8) because the circumstances indicate a lack of trustworthiness in that the plan is developed by a party to this dispute.

However, the plan is certainly admissible as an admission by the CDE that it has not ensured that Dashiell received the compensatory education as ordered, an admission by the District that it has not provided Dashiell with the compensatory education, and for the purpose of impeaching the CDE's disparaging statement that: "It is impossible to determine retrospectively how to assess responsibility for this lack of agreement and resulting protracted non-compliance." (2004 Amended Report, Pl. Exh. 288 at 01063).

X.

CONCLUSION

For the foregoing reasons, both of Plaintiffs motions for summary judgment on the issue of liability are **GRANTED** against the State and Local Defendants. The Local Defendants' cross motion for summary judgment is **DENIED**.

IT IS SO ORDERED.

DATED: December 21, 2004

Judge Gary Allen Feess
United States District Court